

**In the Supreme Court of the United States**

---

BRET TARVER, PETITIONER

*v.*

BO-MAC CONTRACTORS, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

---

**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

---

PAUL D. CLEMENT

*Acting Solicitor General*

*Counsel of Record*

*Department of Justice*

*Washington, D.C. 20530-0001*

*(202) 514-2217*

HOWARD M. RADZELY

*Solicitor of Labor*

ALLEN H. FELDMAN

*Associate Solicitor*

NATHANIEL I. SPILLER

*Deputy Associate Solicitor*

GARY K. STEARMAN

*Attorney*

*Department of Labor*

*Washington, D.C. 20210*

---

---

### QUESTION PRESENTED

Section 3(a) of the Longshore and Harbor Workers' Compensation Act provides compensation and benefits to employees engaged in maritime employment who suffer injuries "upon [the] navigable waters of the United States \* \* \* including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used" by an employer carrying out specified maritime activities. 33 U.S.C. 903(a). The question presented is as follows:

Whether a construction site where two boat slips were being excavated out of dry, undeveloped land at the time of petitioner's injury was an "adjoining \* \* \* wharf \* \* \* or other adjoining area customarily used" for the specified maritime operations within the meaning of Section 3(a).

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	2
Argument .....	5
Conclusion .....	9

## TABLE OF AUTHORITIES

### Cases:

<i>Boomtown Belle Casino v. Bazor</i> , 313 F.3d 300 (5th Cir. 2002), cert. denied, 540 U.S. 814 (2003) .....	4
<i>Brown &amp; Root, Inc. v. Joyner</i> , 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980) .....	4
<i>Fleischmann v. Director, OWCP</i> , 137 F.3d 131 (2d Cir.), cert. denied, 525 U.S. 981 (1998) .....	6
<i>Hurston v. Director, OWCP</i> , 989 F.2d 1547 (9th Cir. 1993) .....	6
<i>Nelson v. Guy F. Atkinson Constr. Co.</i> , 29 Ben. Rev. Bd. Serv. (MB) 39 (Ben. Rev. Bd. 1955), aff'd mem. <i>sub nom. Nelson v. Director, OWCP</i> , 101 F.3d 706 (9th Cir. 1996) .....	4
<i>Northeast Marine Terminal Co. v. Caputo</i> , 432 U.S. 249 (1977) .....	2, 6
<i>Thibodeaux v. Grasso Prod. Mgmt., Inc.</i> , 370 F.3d 486 (5th Cir. 2004) .....	6
<i>Travelers Ins. Co. v. McManigal</i> , 139 F.2d 949 (4th Cir. 1944) .....	4
<i>Trotti &amp; Thompson v. Crawford</i> , 631 F.2d 1214 (5th Cir. 1980) .....	3, 4
<i>United States v. Johnston</i> , 268 U.S. 220 (1925) .....	8

## IV

Statutes and regulations:	Page
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 <i>et seq.</i> :	
33 U.S.C. 902(3) (§ 2(3)) .....	2
33 U.S.C. 903(a) (§ 3(a)) .....	3, 5, 6, 7, 8, 9
33 U.S.C. 908 .....	2
33 U.S.C. 909 .....	2

# In the Supreme Court of the United States

---

No. 04-837

BRET TARVER, PETITIONER

*v.*

BO-MAC CONTRACTORS, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 384 F.3d 180. The decision of the Benefits Review Board (Pet. App. 4-20) is reported at 37 Ben. Rev. Bd. Serv. (MB) 120. The initial decision of the administrative law judge (Pet. App. 23-43) is reported at 36 Ben. Rev. Bd. Serv. (MB) 641 (ALJ). The decision of the administrative law judge denying the private respondent's motion for reconsideration (Pet. App. 21-22) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 21, 2004. The petition for a writ of certiorari was filed on December 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act) provides compensation for work-related injuries that cause the disability or death of covered employees. 33 U.S.C. 908, 909. To be covered by the Act, an injured worker must satisfy two requirements. The first, commonly known as the "status" requirement, see *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-265 (1977), is that the worker must be "engaged in maritime employment." 33 U.S.C. 902(3).<sup>\*</sup> The second, commonly known as the "situs" requirement, see *Northeast Marine*, 432 U.S. at 265, is that the injury must have occurred on a maritime site. This case concerns the situs requirement, set out in Section 3(a) of the Act, which states that a disability or death is compensable only if it "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. 903(a).

---

<sup>\*</sup> Section 2(3) of the LHWCA defines the term "employee" to encompass, with certain exceptions not relevant here, "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3). In the instant case, the court of appeals and the Benefits Review Board each denied petitioner's LHWCA compensation claim on the ground that the injury did not occur at a covered location. Neither tribunal addressed the contention of respondent Bo-Mac Contractors, Inc., that petitioner failed to satisfy the status requirement under Section 2(3). See Pet. App. 2-3, 18 n.8.

2. Respondent Bo-Mac Contractors, Inc., employed petitioner Bret Tarver as a welder on a construction project for two barge slips on “vacant, dry land near the intracoastal waterway in Carlyss, Louisiana.” Pet. App. 1. The land had not previously been used for maritime activity. Pet. 3; see Pet. App. 3. Petitioner was seriously injured while working on the land side of the excavation when a large metal beam pinned him against construction scaffolding. *Id.* at 1-2. At the time, the construction site had been cleared and the slip holes excavated, but land between the holes and the waterway had not been removed. *Id.* at 2. Respondent later filled the slips with water by removing the wall of land between the excavated area and the navigable waterway. *Ibid.*

3. Petitioner filed a claim for disability benefits under the LHWCA. After a hearing, an administrative law judge (ALJ) ruled in petitioner’s favor. Pet. App. 23-43. In determining that the injury had occurred at a covered situs, the ALJ found that the boat slips under construction “could not be any closer to the waterway,” and that the slip had an “inherently maritime purpose and nexus to the waterfront.” *Id.* at 31. While acknowledging that the slips remained unfinished at the time petitioner’s injury occurred, see *ibid.*, the ALJ found it “hardly difficult to imagine that boat slips, with their inherently maritime purpose and nexus to the waterfront, would be included in the ‘adjoining areas’” that are encompassed within the LHWCA’s situs provision. *Id.* at 31-32 (citing *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1218 (5th Cir. 1980)); see 33 U.S.C. 903(a).

4. The Benefits Review Board (Board) reversed. Pet. App. 4-20. “[A]ddressing the situs issue in terms of the construction of maritime facilities,” *id.* at 9, the

Board found that “the determinative facts \* \* \* concern the nature of the site prior to its completion,” *id.* at 16. The Board explained that unfinished dry docks or piers had been found to satisfy the situs requirement in cases where navigable waters had been removed from the construction site by damming off the river and then removing the water from the enclosed area by pumping or filling it with sand, see *id.* at 9-11 (discussing *Travelers Ins. Co. v. McManigal*, 139 F.2d 949 (4th Cir. 1944), and *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980)), or where the unfinished pier was built over navigable waters and carved out of an existing covered situs, such as a port, see *id.* at 12-14 (discussing *Trotti & Thompson*, 631 F.2d at 1218-1220). By contrast, the Board observed, the situs requirement had been held not to be satisfied in cases where injuries occurred at construction sites that had not previously been used for a maritime purpose and were not taken from navigable waters. *Id.* at 14-15 (discussing *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (5th Cir. 2002), cert. denied, 540 U.S. 814 (2003), and *Nelson v. Guy F. Atkinson Constr. Co.*, 29 Ben. Rev. Bd. Serv. (MB) 39 (Ben. Rev. Bd. 1995) aff’d mem. *sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996)).

Applying that analytic framework to the facts of this case, the Board held that the location of petitioner’s injury was not an LHWCA covered situs. Pet. App. 16-17. The Board explained that, under the applicable precedents, petitioner was required to demonstrate “either that, at the time of [his] injury, the location ha[d] a current maritime use, or that the site of the project under construction had been navigable waters or another covered site previously.” *Id.* at 17. The Board



concluded that petitioner could not prevail because “[n]either condition is present in this case. It is undisputed that the barge slip site had no maritime use at the time of [petitioner’s] injury and, moreover, it is evident that the barge slip was not being constructed by the temporary removal of navigable waters, but by the excavation of vacant land.” *Ibid.*

5. The court of appeals affirmed. Pet. App. 1-3. Petitioner contended that the location of his injury was a covered situs under 33 U.S.C. 903(a) because the “construction site would, at some point in the future, serve a maritime purpose.” Pet. App. 3. The court rejected that argument, explaining that “[w]hether an adjoining area is a § 903(a) situs is determined by the nature of the adjoining area *at the time* of injury,” except where a “construction site—although not serving a maritime purpose—was carved out of a covered situs and promised to support navigation in the future.” *Ibid.* Because it was “uncontested that the \* \* \* construction site, at the time of [petitioner’s] injury, was not serving a maritime purpose,” and because petitioner had “acknowledge[d] that the site had not previously facilitated navigation,” the court held that the construction site “does not meet the requirements of the LHWCA.” *Ibid.*

#### ARGUMENT

Petitioner seeks review of the question whether a location specifically enumerated in Section 3(a) of the LHWCA, such as a “pier” or “wharf,” must have been used for maritime purposes at the time of the claimant’s injury in order to qualify as an LHWCA covered situs. See Pet. i, 7-12. That question is not presented in this case, however, since no adjudicative official determined

during the proceedings below that petitioner's injury in fact occurred at one of the enumerated locations. The petition for a writ of certiorari therefore should be denied.

1. To establish his entitlement to benefits under Section 3(a) of the LHWCA, a claimant must demonstrate that the relevant injury occurred "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. 903(a). In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 280-281 (1977), this Court noted, but did not resolve, the question whether a location enumerated in Section 3(a), such as a pier or wharf, must be "customarily used" for one of the specified maritime activities (*e.g.*, loading or unloading a vessel) in order to qualify as a covered situs. See Pet. 10-11. Since that time, a circuit conflict on that question has developed. Compare *Hurston v. Director, OWCP*, 989 F.2d 1547, 1552-1553 (9th Cir. 1993) (holding that a "pier," as an expressly enumerated location, is a covered situs whether or not it is customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel); *Fleischmann v. Director, OWCP*, 137 F.3d 131, 138-139 (2d Cir.) (same), cert. denied, 525 U.S. 981 (1998), with *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 488-493 (5th Cir. 2004) (holding that an enumerated situs must serve some maritime purpose for LHWCA coverage to exist). Petitioner contends (Pet. 6-7) that the facility where he was injured was an enumerated situs, namely a "wharf" within the meaning of Section 3(a). Based on that premise, he argues (Pet. 7-10) that the court of appeals'

resolution of the situs question conflicts with the Ninth and Second Circuit decisions in *Hurston* and *Fleischmann*.

Contrary to petitioner's contention, this case does not implicate the existing circuit conflict. In holding that petitioner failed to satisfy the LHWCA situs requirement, the court of appeals did not cite, let alone rely upon, the Fifth Circuit's prior decision in *Thibodeaux*. And neither the court of appeals, nor the Board, nor the ALJ found that the location of petitioner's injury was a "wharf" within the meaning of 33 U.S.C. 903(a). The ALJ (the only adjudicator in this case who concluded that petitioner had satisfied the situs requirement) found the case to be controlled by the rule that "a particular site is an adjoining area covered by the Act if it has a functional relationship to marine commerce." Pet. App. 30. The ALJ found that, "since piers and wharves have joined dry docks as areas which are expressly covered by the Act, it is hardly difficult to imagine that boat slips, with their inherently maritime purpose and nexus to the waterfront, would be included in the 'adjoining areas'" to which Section 3(a) refers. *Id.* at 31-32.

Absent an adjudicative finding that the location of petitioner's injury was a "wharf" or other specifically enumerated location within the meaning of Section 3(a), this case does not present the question on which the circuits are in conflict—*i.e.*, whether, to establish LHWCA coverage for an injury occurring at one of the locations specifically enumerated in Section 3(a), the claimant must show that the relevant site was "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a). And the fact-specific question whether the location of

petitioner's injury was indeed a Section 3(a) "wharf" clearly does not warrant this Court's review. See, *e.g.*, *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Court generally "do[es] not grant a certiorari to review evidence and discuss specific facts").

2. In light of the absence of any finding below that petitioner was injured on a "wharf" or other enumerated location, the relevant question is not *whether*, but *how*, to apply Section 3(a)'s requirement that an "adjoining area" must be "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" in order to be treated as a covered situs. 33 U.S.C. 903(a). The court of appeals held that the requisite customary use for maritime functions could not be established simply through proof that the construction site where petitioner was injured was intended to serve maritime purposes at some point in the future, *after* the construction work was completed. Pet. App. 3. The court explained that "[w]hether an adjoining area is a § 903(a) situs is determined by the nature of the adjoining area *at the time* of injury," subject to "an exception to this general rule \* \* \* where a construction site—although not [currently] serving a maritime purpose—was carved out of a covered situs and promised to support navigation in the future." *Ibid.* Because the construction site where petitioner was injured "was not serving a maritime purpose" at the time of injury *and* "had not previously facilitated navigation," the court held that the location was not a covered situs. *Ibid.*

Petitioner does not contend that the court of appeals misconstrued the "customarily used" requirement as that requirement applies to "other adjoining area[s]" within the meaning of Section 3(a). Nor does he argue

that the court's interpretation of the phrase "customarily used" conflicts with decisions of other circuits. Rather, petitioner's sole contention (Pet. 7-10) is that the "customarily used" requirement is wholly inapplicable when an injury occurs at one of the locations enumerated in Section 3(a). Because petitioner has failed to establish the antecedent proposition that his injury occurred on a Section 3(a) "wharf" or other enumerated situs, his claim does not warrant this Court's review. See pp. 6-8, *supra*.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT  
*Acting Solicitor General*

HOWARD M. RADZELY  
*Solicitor of Labor*

ALLEN H. FELDMAN  
*Associate Solicitor*

NATHANIEL I. SPILLER  
*Deputy Associate Solicitor*

GARY K. STEARMAN  
*Attorney*  
*Department of Labor*

FEBRUARY 2005